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>> From Phoenix Health Systems...HIPAA Knowledge...HIPAA Solutions <<

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HIPAAAlert is published monthly in support of the healthcare industry's efforts to work together towards HIPAA security and privacy. Direct subscribers total just under 8000.

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1 / FROM THE EDITORS:

This month Phoenix Health Systems recognizes HIPAAAlert's one year anniversary with pride and a bit of astonishment. In October 1999, we delivered Volume 1 No. 1 to just over 1000 initial subscribers. We now directly reach about 8000 healthcare and information technology professionals, plus tens of thousands more through HIPAAAdvisory.com and authorized reprints of HIPAAAlert on many healthcare organizations' intranets.

A year ago, the Congressional deadline to pass privacy legislation had just passed, and DHHS announced it would quickly propose its own privacy rule. This was the beginning of several widely criticized DHHS delays in rules publication, leading many to pronounce HIPAA a doomed pipedream of bureaucratic do-gooders. But it also heralded the real beginning of the healthcare industry's "HIPAAAttention," which has steadily grown. For example, in late 1999, a few security folks asked Phoenix for HIPAAlive, which began as a trickle of e-mail comments - and has become a constant stream of discussion among 1800 members. In April we launched HIPAAAdvisory.com; it received a respectable 1000+

visitors per week from the get-go, but now it greets as many as 1000+ users per day -- many of whom spend long, repeated research sessions with us.

On this anniversary, following publication of the first final HIPAA rule, our latest quarterly HIPAA survey results offer graphic new evidence that the inattentive are now paying attention -- and naysayers are being replaced by believers. Over 450 industry representatives participated in our 2-week snapshot Fall Survey, a third more respondents than in the June survey -- resulting in the largest ever HIPAA survey in the industry, to our knowledge.

And take a look at the results! Clearly, today people everywhere are thinking, learning, talking, planning and acting upon HIPAA. Just as we have observed through HIPAAAlert, HIPAAlive and HIPAAAdvisory's phenomenal growth, the Fall survey results provide a dramatic measure of the industry's growing new nationwide "HIPAAvitality." It's about time...!

One more anniversary note: Phoenix Health Systems appreciates the hundreds of readers who continue to write, call, or seek us out at conferences to offer suggestions and support. So many of you have graciously thanked us for our being here...this is our thanks to you for being THERE. Dare we hope that future generations of healthcare patients, professionals and managers will thank us all for having been in -- and through -- the thick of HIPAA?

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2 / H I P A A l e r t ...Fall 2000 Industry Progress Survey

Results Are In On Largest-Ever Healthcare Industry HIPAA Survey ...

*** HIPAAAlert's Fall 2000 Survey: Patchy But Significant New
Energies Focus on HIPAA Compliance ***

During two weeks in late September/early October, 2000, over 450 representatives of healthcare organizations, including providers, payors, clearinghouses, vendors and others, participated in the largest ever nationwide survey on HIPAA compliance within the healthcare industry. The online survey was the third in a series of quarterly HIPAA surveys conducted by Phoenix Health Systems through its HIPAAAdvisory.com web site and HIPAAAlert newsletter.

The 468 survey respondents included:

> 231 providers (97 hospitals of 400+ beds, 86 hospitals under 400 beds, and 48 other providers)

- > 86 payor organizations
- > 11 clearinghouses
- > 59 healthcare vendors
- > 81 others (i.e. consultants, advisory groups, government agencies)

HIPAA AWARENESS

Since Phoenix' June HIPAA Survey of 371 participants, knowledge of HIPAA and its implications has continued to increase across the industry's senior management -- from 53% of the total reporting moderate or high awareness in June, to 65% by early October. Among providers, 48% felt their executives had moderate to high awareness in June increased to 59% by October. However, HIPAA awareness at the department head level remains low throughout the industry, with 60% of all respondents, and 72% of providers, still reporting little or no department head knowledge in October. One respondent commented, "It's tough to deal with HIPAA when only you and your boss understand it, and everyone else gives you the 'doe in the headlights look' when you mention it." Similarly, another provider claimed "other pressing issues" are delaying its awareness efforts until next year. By contrast, a third respondent reported, "Our company has been actively participating in the NPRM process, HIPAA-watching and planning."

The fact that the first final HIPAA rule (Transactions and Code Sets) was published this August has increased a sense of "HIPAA urgency" among many industry groups. A range of 67 to 75% of payors, vendors and clearinghouses were galvanized by the rule's publication, though only 49% of providers reported moderate to strong response. One provider commented, "Transaction sets is generally viewed in the organization as a payor and IS vendor issue." Another believed that, "like Y2K," HIPAA vendor compliance won't occur until right before compliance deadlines. "Our chances of testing applications are nil until then...thus the feet dragging."

FOCUS OF HIPAA EFFORTS

Not surprisingly, active HIPAA compliance efforts of most industry organizations (approximately 80% of providers and 75% of payors) are still strongly focused on building internal awareness. Over half of all respondents have also begun to look at the assessment process. In general, the industry appears to be undertaking these efforts from an overall HIPAA perspective, rather than focusing on HIPAA rule by rule.

When it comes to actual compliance, clearinghouses and vendors are leading the way, with over half reporting they are well into planning and implementation efforts, compared to less than a third of providers and payors. One provider stated its cautious stance succinctly: "We have a formal HIPAA steering committee with 4 sub-committees. We are working on transaction sets security risk assessment. At this point, we are educating, preparing, but not making any changes until finalized rules are in place."

By contrast, 75% of vendors indicated that they should complete internal testing of HIPAA compliant systems within the next 12 months, and all clearinghouse respondents reported they will be HIPAA-ready

within 18 months. Notably, over half of payors don't think they'll be ready to accept all HIPAA transactions for 24 months or longer -- in other words, until after compliance deadlines. One payor may have hit on an important reason: "There seems to be a great deal of confusion between payors about what is actually required to be compliant. A lot of questions are being asked, and no one seems to have the answers yet."

HIPAA COMPLIANCE AND STRATEGIC PLANNING

Many healthcare organizations have decided to turn HIPAA compliance to their benefit, if possible: over half (including 52% of providers and 59% of payors) intend to incorporate compliance into their strategic plans. Among hospitals this is not as surprising as it might have been prior to the industry's exploding E-health initiatives; two-thirds of hospital respondents indicated that HIPAA compliance will be integral to achieving their E-health strategies. In fact, only 28% of hospitals intend to ensure only basic HIPAA compliance. On the other hand, only 16% plan to exceed HIPAA requirements. Approximately 25% of hospitals reporting still have no formal plans for HIPAA implementation.

RELIANCE ON OUTSIDE RESOURCES

Of those hospitals (143) who have already decided whether to handle compliance internally or with outside consulting help, 45% expect to engage consulting support, primarily in the areas of compliance planning and assessment. According to one HIPAA project manager, "The hardest part of HIPAA is trying to figure out how to proceed with an assessment/risk analysis. Organizing it and understanding what to look for is a monumental task." Almost 75% of payors who've decided on this question are also expecting to use consultants.

While there has been much discussion within the industry on whether the new Transactions and Code Sets standards will cause healthcare providers to move towards -- or away -- from using outside clearinghouses to conduct transactions, the Fall Survey reports neither scenario is likely. An underwhelming 6% of providers indicated they plan such a change, while over 75% plan not to shift.

BUDGETS

Of 183 hospital survey participants, only 99 (54%) disclosed their HIPAA budgets for 2001; in many cases, budgets were either unknown or had not been determined. Within hospitals of 400+ beds who reported budgets (58), nearly half plan a 2001 HIPAA budget ranging from \$100K to \$500K, 19% will spend between \$500 and \$1 million, and 14% expect to spend over \$1 million. The remaining 19% have budgeted less than \$100K for 2001 HIPAA costs.

Within hospitals of less than 400 beds who reported budgets (41), 46% have planned HIPAA expenses of less than \$100K, and another 41% will spend between \$100K and \$500K. About 12% expect to spend over \$500K.

Regarding where dollars and efforts will actually be spent, one provider comment seemed to reflect an opinion of many: "Coordination of transactions and code sets implementations will be a bear!"

But, privacy is bigger and will cost a whole lot more - not only its implementation, but also the ongoing processes that will follow."

INDUSTRY-WIDE COOPERATION

The majority of survey respondents indicated that they feel the industry should work together as a "coordinated task force" to achieve industry-wide compliance. However, providers appeared more skeptical, with only 35% favoring industry coordination. Providers' reasoning on this was not clear; it is possible that they felt that a coordinated industry approach was not realistic, rather than unattractive. About 30% of providers felt they should utilize strategies "tailored" to their organizations, and 25% believed providers should "lead industry efforts."

On the other hand, payors were especially enthusiastic about the industry's working together, with 80% of them favoring this approach. As one payor explained, "It's important to develop a consistent plan and time line for implementation across the healthcare industry. Individual organizations need to develop a plan that meets their specific needs, but we need to be consistent in our approach."

Fall survey results, including graphics, will be available online tomorrow, October 20th at:
<http://www.hipaadvisory.com/action/survey/fall2000.htm>

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3 / H I P A A n e w s

*** House Vote on Privacy Commission Falls Short ***

To the surprise of many privacy supporters, on October 4 the much-publicized Privacy Commission Act (H.R. 4049) fell fourteen votes short of approval by the House. The vote was taken under "suspension of the rules," a parliamentary procedure which prohibits amendments and requires a two-thirds vote for passage.

The legislation would have provided for an 18-month, bipartisan 17-member federally appointed commission to study personal privacy, including online privacy, identity theft, and the protection of health, medical, financial and governmental records.

Companion legislation (S. 3040) has been introduced in the Senate by Sens. Fred Thompson (R-TN) and Herb Kohl (D-WI) and is awaiting action. (Source: Congressional Record)

*** Senate Promises Action on Internet Privacy Next Year ***

During an October 2 hearing on consumer internet privacy, the Senate Commerce Committee learned that self-regulation by the industry is considered inadequate by Senators on both sides of the aisle. Chairman John McCain (R-AZ) stated that "the time has come to enact legislation

to protect consumers' privacy." However, with Congress set to adjourn soon, no action is expected until at least January. (Source: Congressional Record)

*** White House Promises Privacy Rule by End of Year ***

According to a statement on September 28 by White House Chief of Staff John Podesta, the administration is "poised to release a new set of medical privacy rules," and expects the final rule before the end of the calendar year. (Source: CNN)

*** Americans Oppose National Health Record Database ***

An overwhelming majority of Americans do not want the government or other third parties to have access to their medical records - including genetic information -- without their permission. This deep concern about the confidentiality of their medical affairs was revealed in a new Gallup survey commissioned by the Institute for Health Freedom, and reported on September 26.

Key findings include:

- > 78 percent feel it is very important that their medical records are kept confidential.
- > 93 percent say that medical and government researchers shouldn't be allowed to study an individual's genetic information without first obtaining consent.
- > Regarding access to personal medical records without prior permission:
 - 92 percent are against government access
 - 82 percent are against insurance company access
 - 67 percent are against use by researchers
- > 91 percent oppose a federal requirement to assign everyone a medical identification number, similar to a Social Security number, to create a national medical database.

Read the entire Gallup survey, "Public Attitudes Toward Medical Privacy," at:
<http://www.forhealthfreedom.org/Gallupsurvey>

*** NAIC Members Adopt Model Consumer Privacy Regulation ***

Members of the National Association of Insurance Commissioners (NAIC) voted on September 26 to adopt standards for the regulation of Consumer Financial and Health Information. This action will guide the individual states in their efforts to comply with the consumer privacy protections outlined in the Gramm-Leach-Bliley Act (GLBA).

The NAIC's model privacy regulation is a direct response to the requirements set forth by the Congress under GLBA.

Kathleen Sebelius, Kansas Commissioner of Insurance and NAIC Vice President noted, "Our regulation will give consumers protection until the HHS regulation [HIPAA] is implemented."

Consumer groups have criticized the model, claiming the "business functions" exemption is too broad. Additionally, Twila Brase, R.N., president of Citizens' Council on Health Care (CCHC), asserted "Medical research has become the method du jour for opening the medical record. Regulators have determined that patients have no privacy rights when access can be coined a 'public good.' But the fact is, medical records will cease to be reliable for research as soon as patients understand how widespread is the violation of their medical privacy." (Source: NAIC and CCHC)

For more information on these and related news stories, go to:
<http://www.hipaadvisory.com/news/>

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4 / H I P A A d v i s o r : Legal Q/A with Steve Fox, J.D.

*** State Law Pre-emption -- Not So Simple ***

QUESTION: Are state laws preempted by HIPAA's Administrative Simplification regulations?

ANSWER: Generally, HIPAA's Administrative Simplification subtitle preempts state law provisions that are contrary to the provisions or requirements of the subtitle or that are contrary to the standards or implementation specifications adopted or established pursuant to the subtitle. However, there are three exceptions to this rule for:

1. State laws, which the Secretary of the Department of Health and Human Services (the "Secretary") determines are necessary to prevent fraud and abuse, ensure appropriate state regulation of insurance and health plans, for state reporting on health care delivery, and other purposes;
2. State laws which address controlled substances; and
3. State laws relating to the privacy of individually identifiable health information that are contrary to and more stringent than the federal requirements.

The preemption rule does not:

- > invalidate or limit state authority, power, or procedures established under any law that provides for the reporting, surveillance, investigation or intervention in the interest of public health; or

- > limit a state's ability to require a health plan to report or provide access to information for audit, evaluation, licensure, or certification.

What does it mean for a state law to be "contrary"? Basically, state law is "contrary" when it conflicts with federal law. Courts make the determination that state law conflicts with federal law when

- > it is impossible to comply with both the state and federal law; or
- > the state law is an impediment to the accomplishment and execution of the full purposes and objective of Congress in enacting the federal law.

Incidentally, the proposed privacy regulation dissects the meaning of some of the other terminology utilized in the preemption rule (including a discussion of what is meant by, "state law", "relates to individually identifiable health information", "stringent" and "provision of state law") that is particularly helpful in understanding and interpreting the scope of preemption.

The stated purpose of the Administrative Simplification subtitle is to, "... improve the efficiency and effectiveness of the health care system ... by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information." As noted in the proposed privacy rule, many HIPAA regulations will preempt state law. Indeed, Congress' very purpose and intent was, in certain instances, to create uniform national standards. A perfect example is the final rule on standards for electronic transactions. The rule mandates the use of national standardized formats during certain electronic health care transactions and clearly states that "covered entities may not use local codes in standard transactions after compliance with this regulation is required."

As noted earlier, there are exceptions to the rule that says HIPAA preempts contrary state law provisions. The Secretary is left to make determinations about whether certain state law provisions fall within one of the first two exceptions listed above. But how will the Secretary make these determinations? The proposed rule on security and electronic signature standards is silent on the issue and the electronic transactions rule defers to the final privacy regulation. The proposed privacy regulation sets forth a process that would permit the states to request exemption determinations or advisory opinions from the Secretary. There are specific reasons for why these requests must come from the states, but that discussion is beyond the scope of this article. See Standards for Privacy of Individually Identifiable Information, 64 Fed. Reg. 59918, 59997 (proposed Nov. 3, 1999) (to be codified at 45 C.F.R. pts. 160 - 164).

This article was co-authored by Rachel H. Wilson, an associate at Ober/Kaler. Steve Fox, J.D. is Chairman of the Information Systems

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